STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	No. 12-0484
Petition for approval of tariffs implementing	:	
ComEd's proposed peak time rebate program	:	

BRIEF ON EXCEPTIONS OF COMMONWEALTH EDISON COMPANY

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BRIEF ON EXCEPTIONS OF
COMMONWEALTH EDISON COMPANY

Commonwealth Edison Company ("ComEd") respectfully submits this Brief on Exceptions ("BOE") to the Administrative Law Judge's ("ALJ") Proposed Second Interim Order dated June 9, 2014 ("Proposed Order" or "PO") under Section 10-111 of the Public Utilities Act (the "PUA"), 220 ILCS 5/10-111, Section 200.830 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), 83 Ill. Adm. Code 200.830, and the June 9, 2014 Ruling of the ALJ. This BOE includes proposed replacement language as authorized by Section 200.830(b)(1) of the Commission's Rules, 83 Ill. Adm. Code 200.830(b)(1).

I. INTRODUCTION

ComEd takes exception to only one aspect of the Proposed Order: its ruling on ComEd's request that the Commission make a finding under Supreme Court ("Sup. Ct.") Rule 304(a) that there is no just reason to delay appeal or enforcement of the February 21, 2013 Interim Order ("First Interim Order") and the Second Interim Order. All active participants in Phase 2 of this proceeding, including Staff, agree that it would be unreasonable and contrary to the public interest if an appeal of the First Interim Order and Second Interim Order were to be delayed until after 2016 or later, when Phase 3 of this proceeding ends.[1] The Proposed Order concurs.

[1] *See* PO at 16; Joint Draft Position Statements and Draft Conclusions Submitted by Commonwealth Edison Company, Staff of the Illinois Commerce Commission, and Comverge, Inc. ("Joint Draft Proposed Second Interim Order" or "Joint Draft Proposed Order") at 3, 16-18. ComEd understands Staff to question the applicability of and/or the need to make a ruling under Sup. Ct. Rule 304(a).

The Proposed Order, while finding there is no just reason to delay either enforcement or appeal of the Second Interim Order, does not refer to Sup. Ct. Rule 304(a). Moreover, it contains language concerning the need to appeal interim orders generally that goes beyond the alternative language proposed by Staff and ComEd. ComEd appreciates the ALJ's effort to issue a proposed order that achieves the ultimate goal of ensuring that any appeal is not unreasonably delayed. However, as explained below, the Proposed Order's means of achieving this end appears inconsistent with several appellate court rulings and may, in fact, not achieve the intended result. ComEd urges the ALJ to make a finding under Sup. Ct. Rule 304(a). It is undisputed that the facts justify that finding. Moreover, a Rule 304(a) finding is the only lawful and appropriate way to ***ensure*** that effective and jurisdictionally proper appeals, if any, of the First Interim Order and the Second Interim Order are filed now rather than years down the road – a result that is not contested by anyone.

II. THE COMMISSION'S SECOND INTERIM ORDER SHOULD INCLUDE AN EXPLICIT SUP. CT. RULE 304(A) FINDING

A. The Proposed Order Correctly Concludes There Is No Just Reason To Delay Enforcement or Appeal of the First and Second Interim Orders

The Proposed Order (at 16) correctly agrees with the reasoning and rationale supporting ComEd's request for a Sup. Ct. Rule 304(a) finding, stating as follows:

> The Commission notes ComEd's concerns regarding the possible impact on the PTS program if parties were to appeal the determinations made in the First Interim Order or the Second Interim Order after the conclusion of Phase 3 of this Docket in 2016 or later. Because of this concern, ComEd requests that the Commission make a Supreme Ct. Rule 304(a) finding that there is no just reason to delay appeal or enforcement of both the First Interim Order and the Second Interim Order in order to start the appeal time period. In the Commission's view, it would be unreasonable and not in the public interest to allow an appeal two years after a Commission decision. The Commission has already issued a decision on the merits regarding many aspects of Rider PTR in the First Interim Order and is now reaching a decision on the merits on the remaining issues regarding Rider PTR and the DLC pilot.

> These are the Commission's final decisions on these issues and will not be addressed in Phase 3 of this docket. The matter to be addressed in Phase 3 of this Docket – whether or not to modify the PTS Program to include DLC technology for PTS participants based on the results of the DLC Pilot – is separate and distinct from the issues decided in the First and Second Interim Orders. Indeed, ComEd has already relied extensively on the decisions reached in the First Interim Order and ComEd will rely on the decisions reached herein in implementing its PTS program, scheduled to commence in 2015.

ComEd concurs with and fully supports this language in the Proposed Order. The issue to be addressed in Phase 3 – whether or not to modify the Peak Time Savings ("PTS") Program to include Direct Load Control ("DLC") technology for PTS participants based on the results of the DLC Pilot – is separate and distinct from the issues that were decided in Phase 1 and Phase 2. Moreover, parties will have to take actions based on the First and Second Interim Orders prior to the conclusion of Phase 3 to implement, execute, and participate in the PTS Program and the DLC Pilot. Therefore, there is no just reason to delay enforcement or appeal of the First Interim Order and the Second Interim Order. Indeed, as the Proposed Order concludes, it would be unreasonable and contrary to the public interest to delay any appeal.

B. The Proposed Order Interprets the Rehearing and Appeal Provisions of the PUA in a Manner that Has Been Rejected by the Appellate Courts

The Proposed Order next analyzes the statutory prerequisites and standards for an appeal of a Commission order. The Proposed Order (at 16) reasons that – given the broad reference to "any … order or decision" regarding applications for rehearing in Section 10-113 of the PUA – interim orders are an order or decision of the Commission subject to applications for rehearing and appeal, and concludes that the right and ability to appeal the First Interim Order has been waived because no party filed for rehearing:

> The PUA is clear that "[w]ithin 30 days after the service of any rule or regulation, order or decision of the Commission any party to the action or proceeding may apply for a rehearing." The First Interim Order is a decision of the Commission. Section 10-113 continues by stating that "no appeal shall be

> allowed … until an application for a rehearing thereof shall first have been filed." Consistent with this statutory scheme, it is Commission practice to entertain applications for rehearing on interim orders. See Dockets 06-0522/06-0523 (consol.); Docket 02-0479. No party has requested rehearing on the decisions made by the Commission in the First Interim Order and, thus, an appeal of the First Interim Order has been waived.

The Proposed Order correctly notes that an application for rehearing must be filed in order to appeal, and that the statutory time limit during which rehearing must be sought broadly refers to "*any* … order or decision of the Commission." *Id*. Indeed, that language is mirrored in PUA Section 10-201, 220 ILCS 5/10-201(a) (emphasis added), governing a party's ability to appeal:

> Within 35 days from the date that a copy of the order or decision sought to be reviewed was served upon the party affected by *any order or decision of the Commission* refusing an application for a rehearing *of any rule, regulation, order or decision of the Commission*, …, or within 35 days from the date that a copy of the order or decision sought to be reviewed was served upon the party affected by *any* ***final*** *order or decision of the Commission* upon and after a rehearing of *any rule, regulation, order or decision of the Commission* …, any person or corporation affected by such rule, regulation, order or decision, may appeal to the appellate court … for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined.

The apparently literal reading of this language, however, was expressly rejected by the Illinois Appellate Court in *Candlewick Lake Utilities Co. v. Illinois Commerce Comm'n*, 65 Ill. App. 3d. 185 (1st Dist. 1978). *Candlewick* was an appeal of a Commission order denying rehearing of an order to produce certain documents.[2] The appellant argued that the "any order" language of what was then Section 68 of the PUA, now Section 10-201, "creates a right to appeal from a denial of a petition to reconsider an order mandating discovery."[3] The Appellate Court

[2] *Id*. at 186.

[3] *Id*.

acknowledged "that taken literally this language would seem to create that right," but concluded that appeals from interlocutory orders are ***not*** generally allowed, reasoning as follows:[4]

> If we follow the literal language of the statute, it would seem that the appellant is entitled to appeal the order. It is, in the words of the statute, an order of the Commission refusing an application for the rehearing of an order of the Commission. But the court is not required to adhere to a literal interpretation of a statute when such adherence would result in absurd results. [Citations omitted.] Under the interpretation argued by the appellant, a party may appeal from the denial of a petition for the rehearing of any order whether final or not. However, if the petition for rehearing is granted, even if the order remains unchanged, the party can only appeal if the order is final. There is no sense to such a distinction and we do not believe the legislature intended to make one. Furthermore, if we were to allow an appeal from every interlocutory order, there would be interminable delays in the administrative procedures. The general principle in this State is that a party may only appeal from a final order (see for example, *People v. Miller* (1966), 35 Ill.2d 62, 219 N.E.2d 475.) While, of course, exceptions may be created either by rule or, in the case of administrative agencies, by statute (Ill.Const.1970, art. VI, §§ 6, 9), we do not believe that the legislature in amending section 68 intended to make an exception here.

The Appellate Court reaffirmed this holding in *Moncada v. Illinois Commerce Comm'n*, 164 Ill. App. 3d 867 (1st Dist. 1987), an attempted appeal of an order denying rehearing of the denial of a request for class certification and the dismissal of the class action component of the Complaint. After rejecting the argument that denials of class certification are final orders, the Court held that an appeal of a non-final order is not allowed under Section 10-201 of the PUA:

> Additionally, section 10-201 of the Public Utilities Act permits appeals only from final orders. In construing section 68 of the Public Utilities Act, which was recodified as section 10-201, the court in *Candlewick Lake Utilities Co. v. Illinois Commerce Commission* (1978), 65 Ill.App.3d 185, 21 Ill.Dec. 794, 382 N.E.2d 88, addressed the requirement that an administrative order must be a final order to be appealable. There, the utility sought to appeal an order compelling document production and denying a petition for rehearing. This court recognized that the literal language of the statute was misleading and stated:
>
> "[T]he Court is not required to adhere to a literal interpretation of a statute when such adherence would result in absurd results. * * * Furthermore, if we were to

[4] *Id*. at 186-88.

> allow an appeal from every interlocutory order, there would be interminable delays in the administrative procedures. The general principle in this State is that a party may only appeal from a final order. [Citation.] While, of course, exceptions may be created either by rule or, in the case of administrative agencies, by statute [citation], we do not believe that the legislature in amending section 68 [now section 10-201] intended to make an exception here." 65 Ill.App.3d 185, 188, 21 Ill.Dec. 794, 795-96, 382 N.E.2d 88, 89-90.
>
> Thus, we find this court does not properly have jurisdiction over this appeal and it should be dismissed. Only final orders are appealable in administrative proceedings, and this order is clearly not a final order and, accordingly, not appealable.

Moncada, 164 Ill. App. 3d at 871-2 (bracketed material in original).

While these cases did not literally rule on whether a party waives its right to appeal an interim order under the language of Section 10-113 of the PUA where it does not file for rehearing within 30 days after service of such interim order, the holdings effectively dispose of that issue.

- First, it would be inconsistent with and contrary to these decisions and established statutory construction principles to interpret the identical language of these two related sections of Article X – both establishing requirements for appealing Commission orders – to have different meanings.[5]
- Second, the same reasoning is applicable to both circumstances. Requiring parties to immediately apply for rehearing of non-final orders would cause the same delays and inefficiencies relied upon in *Candlewick* and *Moncada* as justification for the holding that only final Commission orders are appealable absent an exception.

[5] *See People v. McCarty*, 223 Ill. 2d 109, 133 (2006) (holding that it is a fundamental rule of statutory interpretation that "two statutes dealing with the same subject will be considered with reference to one another to give them harmonious effect" and that "all the provisions of a statute must be viewed as a whole"); *Land v. Bd of Educ.*, 202 Ill. 2d 414, 422 (2002); *see also Miller v. Dep't of Registration & Educ.,* 75 Ill. 2d 76, 81 (1979) ("The statute should be evaluated as a whole; each provision should be construed in connection with every other section and in light of the statute's general purposes").

- Third, Section 10-113 explicitly provides that the Commission may grant only one rehearing. 220 ILCS 5/10-113(a) ("Only one rehearing shall be granted by the Commission …."). Interpreting the language of Section 10-113 to require parties to seek rehearing at the time of all orders, whether interim or final, would necessarily lead to multiple rehearings.
- Fourth, Section 10-113 mirrors Section 10-201's reference not only to "any … order or decision of the Commission," but also to "a final order upon rehearing …"[6] Consistent with *Candlewick* and *Moncada*, these statutes are properly read to apply the rehearing time limits of Section 10-113 to final orders of the Commission only – just like the parallel language in Section 10-201(a). Further, the general purpose of a rehearing time limit is to identify the end of a trial court's or administrative agency's jurisdiction of the proceeding; such jurisdiction continues and does not end with an interim order.
- Finally, the Proposed Order's interpretation of the rehearing/appeal timing requirements of Section 10-113 conflict with the rehearing/appeal timing requirements of Section 10-201. Section 10-201(a) requires an appeal to be filed within 35 days from the date of service of "any order or decision of the Commission refusing an application for a rehearing …."[7] Under *Candlewick* and *Moncada* a party may ***not*** appeal an interim order – absent an exception – until the final order is entered in the proceeding. In many proceedings – as in the instant case – a final order will not be entered until many months if not more than a year after an interim order, making it impossible for a party to properly file an

[6] 220 ILCS 5/10-113(a).

[7] 220 ILCS 5/10-201(a).

appeal within 35 days of an order denying a petition for rehearing of an interim order.

The Proposed Order (at 16) cites ICC Docket Nos. 02-0479 and Nos. 06-0522/06-0523 (consol.) as examples of cases where the Commission entertained applications for rehearing of interim orders. While correct, that fact does not support the appeal process implications asserted in the Proposed Order. The issue here is not whether an application for rehearing may be filed now,[8] but whether the interim order eliminates any future opportunity to move for rehearing and appeal at the time a final order is entered. That applications for rehearing of interim orders have been entertained in rare cases does not imply that such applications are required.

Moreover, the appellate decisions in those same dockets cannot be squared with the doctrine of waiver set out in the Proposed Order. For example, the Court hearing the appeal of the Order in Docket No. 02-0479 – wherein the Commission allowed services to become declared competitive by operation of law – held the decision on appeal was not an interim order:

> The Commission has the power to administer its proceedings and can, if it chooses, file "interim orders." The interim order, in essence, became a final and appealable decision as to the question of "competitive service" 120 days after the filing of the petition and after the petition for rehearing was denied. We do not treat this case as an appeal of the interim order; rather, it is an appeal of the determination that the service was competitive.

Caterpillar, Inc. v. Ill. Commerce Comm'n, 348 Ill. App. 3d 823, 827 (1st Dist. 2004).

Similarly, Docket Nos. 06-0522/06-0523 (consol.) does not guide this case. There, the August 16, 2006 interim order in Docket No. 06-0522 granted a temporary certificate under Section 8-406(e) and that docket was consolidated with a permanent certificate proceeding,

[8] As the Proposed Order points out, the Commission has in fact entertained such applications from time to time. PO at 16.

Docket No. 06-0523.[9] A verified application for rehearing of the interim order was denied on September 26, 2006.[10] A final order was entered by the Commission almost 11 months later on August 15, 2007, followed by a September 28, 2007, Notice of Commission Action denying the new application for rehearing filed by Northern Moraine Wastewater Reclamation District (the "District") and the filing of an appeal.[11] The Notice of Appeal filed by the District only referenced the August 15, 2007 and September 28, 2007 Commission orders, not the 2006 orders regarding the temporary certificate.[12] The Appellate Court did not hold that the interim order must be immediately appealed; it proceeded instead to decide the appeal without even mentioning that the interim order had not been appealed within 35 days. The interim order ruling was mentioned in connection with the District's argument that the authority of the Commission to grant a certificate was preempted under principles of conflict preemption, but the Court made clear that issue was "moot because the ICC subsequently granted Rockwell a permanent certificate." *Moraine*, 392 Ill. App. 3d at 555-56, 565-66.

ComEd recognizes that the Proposed Order was issued at the request of all parties without the benefit of full briefing and that the issues here are nuanced, complex, and ultimately ones of appellate jurisdiction. But, ComEd respectfully submits that the Proposed Order's conclusion that parties have waived any right to appeal the determinations made in the First Interim Order is contrary to the holdings in *Candlewick* and *Moncada*, inconsistent with the statutory rehearing/appeal timelines set forth in Sections 10-113 and 10-201 of the PUA, and

[9] *N. Moraine Wastewater Reclamation Dist. v. Illinois Commerce Comm'n*, 392 Ill. App. 3d 542, 546 (2d Dist. 2009) (reciting the procedural history).

[10] *Id*. at 547.

[11] *Id*. at 546, 554-5; *See also* ICC Docket Nos. 06-0522 and 06-0533 (Consol.), Notice of Commission Action (Sept. 28, 2007), http://www.icc.illinois.gov/downloads/public/edocket/205241.pdf.

[12] ICC Docket Nos. 06-0522 and 06-0533 (Consol.), Notice of Appeal (Oct. 26, 2007), http://www.icc.illinois.gov/downloads/public/edocket/206870.pdf.

unlikely to withstand any subsequent challenge that would occur. Moreover, as the Proposed Order recognizes, the First Interim Order did not resolve all of the issues with respect to Rider PTR[13] – and the "remaining issues regarding Rider PTR" are being resolved in the Second Interim Order. PO at 16. Thus, not only was the First Interim Order not final and appealable because it did not resolve all claims of all parties under Sup. Ct. Rule 304(a), but it did not even finally resolve all issues regarding Rider PTR. Those issues are conclusively resolved through the Second Interim Order.

C. Sup. Ct. Rule 304(a) is Applicable to Orders of the Commission and a Rule 304(a) Finding Should be Made Here to Ensure that Any Appeal of the First Interim Order and Second Interim Order is Not Unreasonably Delayed to the Detriment of the Public Interest

The central question is whether there is a means to ensure that appeals of the First Interim Order and the Second Interim Order, if any, occur now rather than years from now so as not to unduly complicate or jeopardize implementation of the PTS Program. The simple answer is that a Sup. Ct. Rule 304(a) finding is an effective means to require any appeals of the First Interim Order and Second Interim Order to proceed now.

First, it is clear that the Illinois Supreme Court Rules are generally applicable to appeals from Commission orders. Rule 335 itself sets forth "the procedure for a statutory direct review of orders of an administrative agency by the Appellate Court," and provides that "[i]nsofar as appropriate, the provisions of Rules 301 through 373 (except for Rule 326) are applicable to proceedings under this rule."[14] Section 10-201(b) of the PUA confirms this, stating that

[13] Indeed, the First Interim Order contained ordering language stating "that this Order is not final …. First Interim Order at 33.

[14] Sup. Ct. Rule 335(i)(1) ("Insofar as appropriate, the provisions of Rules 301 through 373 (except for Rule 326) are applicable to proceedings under this rule.").

Commission "appeal[s] shall be heard according to the rules governing other civil cases, so far as the same are applicable." 220 ILCS 5/10-201(b).

Governing precedent is in accord as well. The Illinois Supreme Court, for example, ruled in *Harrisonville Tel. Co. v. Ill. Commerce Comm'n*, 212 Ill. 2d 237, 246 (2004) that the General Assembly has exercised its constitutional authority to provide for review of Commission orders by the appellate court rather than the circuit court, and also provided that "'Rules governing other civil cases,' *i.e.* supreme court rules, govern such an appeal. 220 ILCS 5/10-201(b) (West 2002); see also 155 Ill. 2d R. 335 …." A comprehensive review of the leading opinions rejecting arguments that Supreme Court Rule 303 does not apply to an appeal of a Commission order is contained in *People ex rel. Madigan v. Ill. Commerce Comm'n*, 407 Ill. App. 3d 207, 213-222 (1st Dist. 2010), where the Court concluded "that Rule 303(a)(2) governs the petitions for judicial review filed by the parties in [that case]."

The relevant rule here is Illinois Supreme Court Rule 304(a) which provides, in part:

> If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party.

Sup. Ct. Rule 304(a). There do not appear to be any appellate court opinions specifically addressing the applicability of Supreme Court Rule 304(a) to Commission orders (although the analysis supporting the determination that Rule 303 is applicable to Commission proceedings similarly supports that same determination for Rule 304), but the decision of the Appellate Court in *Matson v. Dep't of Human Rights*, 322 Ill. App. 3d 932, 937-8 (2nd Dist. 2001) is instructive.

The *Matson* Court dismissed an appeal of some – but not all – of the counts of a discrimination Complaint where no Rule 304(a) finding was obtained. It held that Supreme

Court Rule 304 applies to direct appeals from orders by administrative agencies to the appellate court pursuant to Supreme Court Rule 335(i)(1) and rejected the argument that simply stating the order was immediately appealable sufficed for a Rule 304(a) finding. *Matson*, 322 Ill. App. 3d at 939. While acknowledging "that the absence of *Rule 304(a)*'s precise wording from the order appealed does not conclusively preclude appellate jurisdiction," the Court concluded that "it must be clear that *Rule 304(a)* is intended to be invoked." *Id.* (emphasis added). The absence of (i) a request for a finding pursuant to Rule 304(a), (ii) a reference to Rule 304(a) in the order, and (iii) language tracking Rule 304(a) in the order were key factors in the Court's determination that no Rule 304(a) finding had been made. *Id*. at 939-40.

As explained above, the PUA, Supreme Court Rules, and relevant case law all establish that Supreme Court Rule 304(a) applies to Commission orders, and that a Rule 304(a) finding must be made if the Commission wants an interim order that does not resolve all claims for all parties to become subject to appeal and the applicable time line for filing an appeal. Under the *Matson* opinion, it is also imperative that the language used to make a Rule 304(a) finding be clear that *Rule 304(a)* was intended to be invoked. Because "the purpose of Supreme Court Rule 304(a) is to discourage piecemeal appeals in the absence of just reason and to remove the uncertainty that exists when a final judgment is entered on less than all matters in the controversy,"[15] the Commission should not hesitate to make the specific Rule 304(a) finding.[16]

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[15] *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 368 Ill. App. 3d 734, 740 (2d Dist. 2006), *citing Yugoslav-American Cultural Center, Inc. v. Parkway Bank & Trust Co.*, 327 Ill. App. 3d 143, 147 (2001).

[16] While not precedential because the order was issued under Supreme Court Rule 23, the dismissal of the appeal in *Malibu Condo. v. Ill. Commerce Comm'n*, 401 Ill. App. 3d 1140 (1st Dist. 2010) shows that the Commission has successfully argued for dismissal of an appeal of an interim order where the appellant's application for rehearing was denied but it did not obtain a Supreme Court Rule 304(a) finding. ICC Docket No. 08-0401, July 22, 2010 Order of the Court (June 24, 2011), http://www.icc.illinois.gov/downloads/public/edocket/296814.pdf. Hence, collateral estoppel principles would prevent the Commission from finding that it universally entertains applications for rehearing on interim orders for the purpose of facilitating the immediate appeal of such orders. *See Hurlbert v. Charles*, 238 Ill. 2d 248, 255 (2010) ("The doctrine of collateral estoppel bars relitigation of an issue that was already decided in a prior case … [and] the three requirements for the application of collateral estoppel are that:

It should also be noted that the Commission has recently made just such a Rule 304(a) finding. *Commonwealth Edison Company*, ICC Docket No. 13-0285, Interim Order (June 5, 2013) at 5, 6.

Here, the language of the Proposed Order tracks Rule 304(a), but it appears to call into question rather than establish that Rule 304(a) was intended to be invoked. It states (at 16):

> The Commission agrees that there is no just reason for delaying either enforcement or appeal of the determinations made in this Second Interim Order, and after a proper application for rehearing is filed and resolved, then this order will constitute a final appealable order on the issues decided herein. Whether the Commission relies upon its statutory authority or applies the Supreme Court rule, the effect is the same.

This language should be revised to include the First Interim Order and make clear that Rule 304(a) is being invoked. As noted above, it is not contested that it would be appropriate to find that there is no just reason for delaying either enforcement or appeal of the determinations made in the First Interim Order and the Second Interim Order.

D. Proposed Revisions to the Proposed Order's Language Regarding a Sup. Ct. Rule 304(a) Finding

The Commission should revise the language of the Proposed Order as follows:

> **III. Commission Analysis and Conclusions**
>
> * * *
>
> The Commission notes ComEd's concerns regarding the possible impact on the PTS program if parties were to appeal the determinations made in the First Interim Order or the Second Interim Order after the conclusion of Phase 3 of this Docket in 2016 or later. Because of this concern, ComEd requests that the Commission make a Supreme Ct. Rule 304(a) finding that there is no just reason to delay appeal or enforcement of both the First Interim Order and the Second Interim Order in order to start the appeal time period. In the Commission's view, it would be unreasonable and not in the public interest to allow an appeal two years after a Commission decision. The Commission has already issued a decision on the merits regarding many aspects of Rider PTR in

(1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication").

the First Interim Order and is now reaching a decision on the merits on the remaining issues regarding Rider PTR and the DLC pilot. These are the Commission's final decisions on these issues and will not be addressed in Phase 3 of this docket. The matter to be addressed in Phase 3 of this Docket – whether or not to modify the PTS Program to include DLC technology for PTS participants based on the results of the DLC Pilot – is separate and distinct from the issues decided in the First and Second Interim Orders. Indeed, ComEd has already relied extensively on the decisions reached in the First Interim Order and ComEd will rely on the decisions reached herein in implementing its PTS program, scheduled to commence in 2015. Accordingly, the Commission agrees and finds pursuant to Supreme Court Rule 304(a) that there is no just reason for delaying either enforcement or appeal of the determinations made in the First Interim Order and this Second Interim Order.

~~The PUA is clear that "[w]ithin 30 days after the service of any rule or regulation, order or decision of the Commission any party to the action or proceeding may apply for a rehearing." The First Interim Order is a decision of the Commission. Section 10-113 continues by stating that "no appeal shall be allowed . . . until an application for a rehearing thereof shall first have been filed." Consistent with this statutory scheme, it is Commission practice to entertain applications for rehearing on interim orders. See Dockets 06-0522/06-0523 (consol.); Docket 02-0479. No party has requested rehearing on the decisions made by the Commission in the First Interim Order and, thus, an appeal of the First Interim Order has been waived.~~

~~The Commission agrees that there is no just reason for delaying either enforcement or appeal of the determinations made in this Second Interim Order.~~ , and after a proper application for rehearing is filed and resolved, then this order will constitute a final appealable order on the issues decided herein. Whether the Commission relies upon its statutory authority or applies the Supreme Court rule, the effect is the same.

IV FINDINGS AND ORDERING PARAGRAPHS

* * *

(8) Commonwealth Edison Company has complied with the directives in the First Interim Order, including the directives which required ComEd to provide progress reports regarding its customer research into pre-enrollment; and ~~.~~

(9) Pursuant to Supreme Court Rule 304(a), there is no just reason for delaying either enforcement or appeal of the determinations made in the First Interim Order and this Second Interim Order.

* * *

IT IS FURTHER ORDERED that this order is ~~not~~ final as to all matters determined herein; it ~~and~~ is not subject to the Administrative Review Law.

III. CONCLUSION

WHEREFORE, ComEd respectfully requests that the Proposed Order be modified as set forth herein.

Dated: June 23, 2014

COMMONWEALTH EDISON COMPANY

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